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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1950

No. 322

TRANSAMERICA CORPORATION and SAM H. HUSBANDS,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review orders of the United States Court of Appeals for the Ninth Circuit, issued June 23 and June 24, 1950, granting a temporary restraining order and an injunction against petitioner corporation, and an order of that court, issued July 13, 1950, adjudging petitioners guilty of civil contempt of the aforesaid orders.

Opinions Below.

The court below issued an opinion on June 27, 1950, relating to its injunction order of June 24, 1950 [R. 72-82]; and an opinion on July 10, 1950, relating to its contempt order of July 13, 1950 [R. 155-166]. These opinions are unreported.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (62 Stat. 928).

Questions Presented.

1. Does the United States Court of Appeals have jurisdiction, upon an original petition filed with it by a government agency (Board of Governors of the Federal Reserve System) which is conducting an uncompleted administrative proceeding, to issue an injunction to protect the contingent jurisdiction of the court to review a possible administrative order of the Board?

2. Does it have such jurisdiction

(a) where no proceedings have been commenced in a district court?

(b) where there is no evidence before the Court of Appeals indicating any probability of an adverse order by the administrative agency other than evidence of the mere pendency of the administrative proceeding, where the taking of evidence has not been completed and no findings or order have been made by the administrative agency, and where the contingent review may be had only in the manner and subject to the conditions prescribed in Section 11 of the Clayton Act?

(c) where the conduct enjoined does not obstruct or frustrate the alleged objective of the pending administrative proceeding?

(d) where the Board's pending administrative proceeding is solely against a bank stockholder (Transamerica Corporation) and is beyond the jurisdiction conferred on the Board by Section 11 of the Clayton Act to enforce compliance with certain sections "where applicable to banks"?

(e) where the court issuing the injunction has not been and may never be designated as the reviewing court?

3. After the Comptroller of the Currency, in the exercise of his exclusive jurisdiction under 12 U. S. C. § 36 (U. S. R. S. § 5155), has authorized the establishment at designated locations of branches of a national bank as successors to existing banks which are in process of dissolution, does the Court of Appeals have jurisdiction to enjoin the establishment and operation of such branches and to compel the existing banks to resume and continue in business, upon original petitions filed with it by the Board of Governors of the Federal Reserve System in a proceeding to which the Comptroller is not a party and in which there is no claim that he has abused his discretion or acted in a manner inconsistent with the public interest?

4. Is it proper for a Court of Appeals

(a) to issue a temporary restraining order *ex parte* without requiring the kind of showing concerning irreparable injury and impossibility of notice required of district courts by Rule 65(b) of the Federal Rules of Civil Procedure?

(b) to issue an injunction prohibiting acts which the uncontradicted evidence shows have already been completed?

(c) to issue an injunction and civil contempt order solely on the basis of affidavits without affording petitioners rights of cross-examination, compulsory process, and oral testimony?

(d) to issue such orders at the request of a government agency which despite longtime previous knowledge of the facts, has delayed taking action until rights of hundreds of

thousands of members of the general public, in addition to petitioners, have vested?

(e) to find parties guilty of civil contempt of court because of inaction, subsequently construed to be a violation of a temporary restraining order and injunction order, where the conduct of the parties, pursued on advice of counsel, conformed fully with the only reasonable interpretation of the restraining language used, where the facts and the parties' interpretation of the court's order had been immediately disclosed to the court, and where the court apparently concurred with the interpretation adopted?

Statutes involved.

The pertinent provisions of Sections 7, 8, 11, and 15 of the Clayton Act and relevant provisions of the Judicial Code are printed in the Appendix, *infra*, pp. 37-44. Pertinent provisions of the United States banking acts and regulations are printed in the Appendix, *infra*, pp. 45-48. Certain relevant California Banking Code provisions are printed in the Appendix, *infra*, pp. 48-51.

Statement.

In San Francisco, at 4 o'clock on a Friday afternoon, June 23, 1950, the Court of Appeals, Ninth Circuit, by *ex parte* restraining order, took original jurisdiction under the "all writs section" (28 U. S. C. § 1651, 63 Stat. 102), on the mere request of one government agency, the Board of Governors of the Federal Reserve System (herein called Board), to prohibit a national bank from acquiring the assets of 22 other banks, all located in California [R. 25-27; 3-7]. Prior to the issuance of the restraining order the selling banks had begun proceedings to dissolve [R. 310-311; 314] and officers of the purchasing bank had taken charge in each affected location, as a preliminary to the opening of branches of the purchasing bank there on the following Monday morning [R. 337; 297; 325; 370]. The opening of such branches with the acquired assets had been

officially authorized by another government agency, the Comptroller of the Currency (herein called Comptroller), after investigation [R. 254-255; 34; 60; 259-269; 333-334]. The opening of such authorized branches was not prohibited by the restraining order of June 23, as the parties understood it then, or by an injunction order in similar language which was issued on June 24 [R. 283-290; 371-372; 330; 341-342]. However, the court, in a subsequent order of July 13, 1950, in effect construed the earlier orders as prohibiting the opening of these branches by requiring that "exclusive possession of the premises" be restored to the selling banks [R. 176].

The Comptroller is not a party to any proceedings before the Board or in court, although he is vested by law with supervisory jurisdiction over all national banks and admittedly [R. 539; 612] has exclusive jurisdiction to determine in his discretion when, where and in what circumstances a national bank may establish a branch [12 U. S. C. § 36, U. S. R. S. § 5155; 12 Code Fed. Reg. § 4.5].

For the first time in history, the Board asserts in this proceeding that it has the power to override such decisions of the Comptroller. The only basis upon which the Board asserts such power is that at some future time, after completing an administrative investigation, it may decide to seek an order compelling Transamerica Corporation[1] to divest itself of some of the bank stocks it now owns.

The Board's uncompleted administrative proceeding was commenced on June 24, 1948 by filing an unverified complaint against Transamerica [R. 7-8; 24-25]. Transamerica is the only party to that proceeding, which was purportedly brought under Section 7 of the Clayton Act (15 U. S. C. § 18) to determine whether Transamerica should be re-

[1] Transamerica Corporation, herein called Transamerica, is not a bank and does not operate banks. It is a Delaware corporation, having its principal place of business in California, and is engaged only in the business of owning and holding stocks of other corporations, including banks [R. 305-306; 78]. Sam H. Husbands is president of Transamerica [R. 299].

ing banks which were state banks, the formal certificates from the State of California, fixing the close of business June 24th as the time when title should pass "by operation of law" (Calif. Banking Code § 2057), were received on June 23rd at noon [R. 313]. The contracts involved were contracts of present sale [R. 40-43; 33; 54-57; 34].

Detailed arrangements, worked out over a period of months, had been completed for the opening of branches of the Bank of America in the premises of the selling banks and the assumption of deposit liabilities and fiduciary responsibilities had been announced to the public, including 130,000 depositors of the selling banks, who thus knew that they could look to Bank of America after June 24th for payment of their deposits [R. 34-36; 60-63]. Officers of the Bank of America had taken charge in each location several days before June 23rd [R. 337; 297; 325; 370] and about 40 tons of Bank of America supplies had been installed and laid out for use [R. 279-280; 336; 268]. The selling banks' supplies had been dumped [R. 270].

Petitioners did not and do not believe that these acquisitions were of any official concern to the Board. The Board has never asserted (the orders below to the contrary notwithstanding) that it has jurisdiction, under Section 7 of the Clayton Act or otherwise, to veto sales of the assets and business of banks, or to prevent the voluntary liquidation of banks whose directors and shareholders vote to dissolve and liquidate, or to stop the opening of branches of national banks when and where authorized by the Comptroller.

The Board had previously asserted the right to seek an order doing just two things, *viz.* (1) stopping Transamerica from buying the stocks of any more banks in the five far western states, and (2) possibly compelling Transamerica to divest itself of "any or all" of the stocks it now owns in banks located in those states [R. 293; 25]. The 22 banks, whose dissolution and sale of assets were restrained by the court below, represented 2.4% of the bank deposits referred to in the Board's Clayton Act complaint [R. 340].

It was all the more surprising therefore that, after remaining silent for more than two months with full knowledge that Bank of America was publicly committing itself to its 160,000 stockholders and to the 130,000 depositors of the 22 selling banks, and while 125,000 individual subscriptions by investors were being entered and $71 million was being paid in through such subscriptions for new stock in reliance on the good faith commitment of the United States Government that establishment of additional branches would be approved and permitted, the Board should attack the transaction, and especially without notice to the parties or their counsel. The Solicitor of the Board came to San Francisco on Tuesday, June 20th, for the purpose of belatedly attacking this transaction on ~~July~~ June 23rd [R. 367]. Neither his presence nor his intention was known to petitioners [R. 367; 281-282]. The offices of petitioners and their counsel are within a few blocks of the Court House and counsel would have been available on a moment's notice [R. 367]. However, during even these last three days in which the transactions were completed, the Board gave no notice whatever [R. 367].

On June 23rd Board counsel appeared before three judges of the Ninth Circuit Court of Appeals *ex parte*. No showing was made as to the reasons for failure to give notice. No other showing was made of the type prescribed by this Court in Rule 65(b) of the Federal Rules of Civil Procedure applicable to district courts. Nevertheless, a restraining order issued, *ex parte*, ordering Bank of America and Transamerica to refrain "from consummating or effectuating any arrangement or undertaking which will result in Bank of America National Trust and Savings Association acquiring the assets or banking business of any or all * * *" of the selling banks [R. 25-27; 78]. Nothing else was prohibited. Bank of America and Transamerica were the only parties enjoined [R. 25]. The order made no mention of the opening of the branches. The Comptroller, who has exclusive jurisdiction of that

subject—exclusive of the Board and of the courts—was not a party to the proceedings, nor was there any allegation in the petition or otherwise attacking the validity of the permits that he had issued [R. 3-7].

After receiving word of the order, at 4 p. m. Friday, June 23rd, L. M. Giannini, president of Bank of America, wired the Comptroller of the Currency and the Chairman of the Federal Deposit Insurance Corporation for suggestions as to a course of action [R. 130-132; 344]. However, the offices of these crucial agencies were closed and would not reopen until Monday. (The restraining order was served at 4 p. m. Pacific Daylight Saving Time or 7 p. m. Eastern Daylight Saving Time.) The banking offices were due to open on Monday, June 26th, as branches of the Bank of America [R. 34-36; 60-63]. No replies were received by Monday morning [R. 344].

A hearing was obtained the next morning, Saturday, June 24th, on a motion to dissolve the restraining order. Argument proceeded until early afternoon and the court took the matter under advisement [R. 68].

At 7 p. m. Saturday, June 24th, the court denied the motion to dissolve the temporary restraining order and issued its injunction order, which in substantially the same words as the temporary restraining order, forbade consummation of acquisition of the assets of the banks, pending final action in the Board's Clayton Act proceeding [R. 284; 68-71]. No explanatory opinion was issued by the court until Tuesday, June 27th [R. 72].

After notice of the restraining order petitioners took no action to consummate the transaction. They affirmatively took steps to prevent further action. No payments were made for the assets of these banks. No deeds were recorded. Dissolution of the selling banks was postponed indefinitely. Many other scheduled transactions were halted, as the record shows [R. 287; 132-135].

But the acquisitions had become finally effective by operation of law, without any action by petitioners, at the close of business on Saturday; and this had occurred as a nec-

essary result of the acts performed and government approvals given over a period of months prior to the issuance of the restraining order on Friday [R. 256-280; 285-286; 336-338; 356; 382-385]. Calif. Banking Code § 2057 (Appendix, p. 50, 51). There was absolutely nothing these petitioners could then do to prevent this. The alternative on the next business day was for Bank of America, which then owned the assets, to open the offices as branches or to allow their doors to remain closed [R. 338; 342-343; 286-290]. Transamerica had no part in Bank of America's decision [R. 303-305], but it was obviously unthinkable for Bank of America, the largest bank in the United States, to keep the doors of 27 branches closed on a regular banking day, without a court order specifically requiring such closure and with the probable catastrophic consequences to the general public.

Petitioners had consulted their counsel and were advised by counsel that the court order did not mean that the branches could not open for business on Monday. Counsel pointed out that the court's order prohibited only consummating or effectuating the *acquisitions*; that it did not relate to opening the branches; and that it did not purport to require a reversal or rescission of the steps which had already been completed and which had resulted in vesting of title to the assets and businesses in Bank of America, and in Bank of America's assumption of $162 million of liabilities to 130,000 depositors of the selling banks [R. 282-287; 302-306]. Counsel and petitioners took comfort from the court's apparent concurrence with their interpretation at the hearing before the court on Saturday, June 24 [R. 285; 531].[2]

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[2] There was no stenographic transcript of proceedings at the first hearing (on Saturday, June 24th) but the description of this incident by petitioners' counsel at the second hearing (on Friday, June 30th) was acquiesced in by the court:

"MR. STEWART: * * * I do recall, I believe, that on Saturday morning I made the statement that, as I understood it, the order

All of the details necessary to undo the transactions, could not, in any event, have been worked out over a week-end [R. 278-279; 286-290; 336-338; 342-344; 350-351; 380-381]. The subsequent undoing actually took 21 days of intensive work (July 18th to August 7th) and this was admitted to be "speedy" [R. 569-599; 606-613; 616; 621-641].

Accordingly on Monday morning, Jun 26, 1950, the banking offices at the locations formerly occupied by the 22 banks

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did not require the reversal of anything that had been done, and I believe it was Judge Orr who commented that the Court had not been asked for any such order, or at least I so understood the comment at that time. I did not understand that there was any prohibition in the Court's order against the opening of branches by the Bank of America pursuant to permits issued by the Comptroller of the Currency—those permits not being conditional in any way upon the acquiring of the assets; and it being a situation that in our opinion, and in the opinion of counsel who advised the bank, title to the assets had been acquired—

"JUDGE ORR: Pardon me. Was it understood that the order required the maintenance of the status quo?

"MR. STEWART: That, sir, was understood and instructions were issued, as will appear to your Honors when the full facts are presented to you, to stop everything that could be stopped." [R. 421]

Counsel's affidavit of July 5, repeated the circumstances as follows:

"* * * I stated that I had made it clear to the court in my oral argument that morning that I did not interpret the court's order as requiring a reversal of any action aleady taken, and that one of the judges, with the acquiescence by silence of the other two, had stated that the court had not been asked for any such order. I further stated that I had explained to the court in oral argument that morning my understanding that the order merely required the stopping of any further affirmative action which would result in the acquiring of the assets and banking business referred to, and that the court had not in any manner indicated its intention that the order be interpreted otherwise. * * *" [R. 285]

The incident was discussed a third time at the hearing of July 7th, at which a second member of the court, Judge Pope, confirmed the substance of what had been said by Judge Orr on June 24th, as "something to the effect that we had not been asked to order anything to be undone" [R. 530].

opened their doors as branches of the Bank of America, as authorized by the Comptroller [R. 126].

On the following Tuesday, June 27, however, the court issued an opinion setting forth its reasons for granting the injunction of June 24th [R. 72-82].

Simultaneously the court signed an order on petition of the Board requiring petitioners and Bank of America and its president, L. M. Giannini, to show cause why they should not be held in civil and criminal contempt by reason of the opening of the branches on Monday by Bank of America [R. 90-91].

Petitioners attempted to obtain depositions in the contempt proceeding and in support of their applications to dissolve the court's injunction [R. 93-103; 385-436]. The court quashed petitioners' notice of taking depositions and required petitioners to try the contempt proceeding and their application to dissolve the court's injunction without court process, without witnesses, without confrontation and without cross-examination [R. 102-103; 461-462; 521-523].

The hearing on the contempt charges and on the application to dissolve the injunction was held on July 5th. In the case of one party, L. M. Giannini, the hearing was adjourned to July 7th because of the collapse from overwork of the counsel who had been representing him. Mr. Giannini, however, was required to remain in court while the hearing proceeded that day and was given only one additional day to obtain new counsel to represent him. [R. 436-438; 148-151]. On July 10th the court below issued an opinion dismissing the criminal contempt citation [R. 166]. It held petitioners guilty of civil contempt, and required that within thirty days they restore the premises, assets and businesses to the 22 selling banks; and specifically that Transamerica and Husbands "shall place" the banks in a position to resume business, and that Bank of America and Giannini "shall restore said premises, assets and businesses to said banks" [R. 166].

The court held that if the order were not complied with, the individuals should be imprisoned and the companies should each pay a fine of $2,500 per day, until compliance was effected [R. 166].

The court's order in the civil contempt proceeding was entered on July 13, 1950. This order went even beyond the scope of the opinion of July 10. It required Transamerica and Husbands to "cause" the selling banks to resume business (i.e., to refrain from dissolving, liquidating or selling their assets and businesses to anyone, and to remain in business against their will), and it directed Bank of America and Giannini to restore "exclusive" possession of the premises to the selling banks (i.e., to remove the authorized Bank of America branches from those premises) [R. 176; 612].

Stays were requested of the court below, and of Mr. Justice Burton here, pending action by this court, but these requests were denied [R. 559-560]. Therefore, compliance with the contempt order was required by August 9, 1950, and all necessary steps were taken by the parties to cause the selling banks to resume business and to restore exclusive possession of the premises to the selling banks.

These steps, which required 3 weeks of intensive effort, included calling special meetings of shareholders of each of the 22 banks to elect directors; negotiations to persuade 146 individuals to repurchase the necessary qualifying shares so that they might legally serve as directors; special meetings of directors to complete and take action upon the proposed retransfers; preparation of new agreements of purchase and sale pursuant to which the assets might be retransferred but the previous agreements be kept alive subject to the removal of restraints by this Court; and reconversion of all the banks to their former methods of doing business [R. 568-599; 621-625].

Thus we have a proceeding in which, without notice or hearing, an appellate court acting on *ex parte* representations by counsel for an administrative Board, asserted that

it had the general equity powers of a district court and attempted to restrain the performance of acts which had already been performed; and in which, when an effort was made by the parties affected to lay before the court the jurisdictional and factual deficiences of the Board's position, the court made its restraint permanent and subsequently converted its previous prohibition into a mandatory requirement, sanctioned by threat of punishment for contempt, that completed business transactions, which had been authorized by the appropriate supervisory authorities, be reversed and undone in advance of any appellate review and regardless of demonstrated detriment to the general public and untold expense to the respondents.

Opinions of the Court Below.

The court below stated in its opinion of June 27th that it had jurisdiction under the all writs section on the ground that the writ might be issued to prevent frustration of the ultimate exercise of its contingent jurisdiction even before a reviewable order had been entered and before any proceeding in any court had been initiated by the administrative agency. It held that it had jurisdiction even though under the statute the option would be available to Transamerica to seek review of any order of the Board in either the Third Circuit or the Ninth Circuit. It analogized the situation to the case of a threatened destruction or removal of a *res in custodia legis*. It stated that although the Board had no jurisdiction to control sales of assets during the pendency of its proceeding, citing *Arrow-Hart & Hegeman Electric Co.* v. *F. T. C.*, 291 U. S. 587, nevertheless if the transfer were postponed until the Board made its final order, it might then have power under *F. T. C.* v. *Western Meat Co.*, 272 U. S. 554, to control or prevent the sale of assets as incidental to its jurisdiction to order divestiture of stock. It thus held it had the right to prevent the transfer of assets until a Board order might be entered.

It discussed the facts and, despite uncontradicted evidence to the contrary [R. 337; 297; 325; 370], held that the transfer of possession had not been completed when the restraining order was served and that the restraining order prohibited Bank of America from taking possession of the assets.

It held that the Board had not unduly delayed the proceedings because it proceeded three days after issuance of the formal permits of the Comptroller on June 20th. (In the subsequent opinion in the contempt proceedings the court conceded that its original opinion was erroneous in that the Federal Reserve Board had had knowledge of the Comptroller's approval and of the intended acquisition and opening of the branches since the middle of April, but stated that this merely went to the balancing of the conveniences.)

It also held that the fact that the Comptroller had granted permits for the opening of branches at the locations of each of the selling banks showed "an unfortunate working at cross purposes of two government agencies." It stated that the Comptroller neither has authority with respect to questions relevant to Clayton Act violation "nor purported to exercise it." (In the subsequent proceeding the Comptroller himself supplied an affidavit as set forth above, that, in accordance with standard procedure, he had carefully considered the questions affecting competition of the banks in question.)

In its opinion of July 10th, in the contempt proceeding, the court analyzed the facts and determined that its original order had not been obeyed. It did not charge that any action relating to passage of title had been taken after the service of the restraining order, but held that the restraining order required an affirmative direction that the "takeover" date be indefinitely postponed.[3]

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[3] Such dates are shown by the record [R. 265-269; 355-357] to be fixed in such transactions in consultation with or approval by supervisory authorities with a view to effecting continuity of the banking business and fixing rights and liabilities of predecessor and successor banks with respect to depositors and creditors.

In connection with its denial of cross-examination, the court stated that it based its determination as to facts "solely and exclusively upon the answers and the affidavits presented by the respondents before it," despite the fact that it received in evidence affidavits of the Board, denied motions to strike those affidavits, and reached several important conclusions of fact completely inconsistent with respondents' affidavits, and supported only by the affidavits of the Board.[4]

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[4] For Example:

The court says: "Apparently the Comptroller felt obliged to issue these certificates in return for an agreement of the respondent bank to increase its capitalization to a figure which he thought necessary in the public interest. Doubtless the Comptroller deplored the state of the law which reduced him to this expedient." [R. 80] The intimation that the Comptroller was coerced is an unjust and unwarranted impeachment of the validity and good faith of the action of a responsible official of the government. Yet even when the error of the court's conclusions was established by the Comptroller's own affidavit [R. 254, 255], the court did not withdraw its statement.

The court's opinion denied that the Comptroller has authority to approve the proposed transfers or that he purported to exercise it [R. 79, 80]. The Comptroller's uncontradicted affidavit establishes the contrary. [R. 254, 255].

The court sustained a contempt petition, the sole and basic premise of which was that the effect of the opening of branches on Monday, June 26th, was "to enable Bank of America * * * to acquire" the forbidden assets [R. 83, 84, 90], but the court's own opinion on the contempt recognizes that the acquisition occurred by operation of law and without any affirmative act of the parties two days before the branches were opened, viz., at the close of business on Saturday, June 24th [R. 156, 159, 160].

The court accepts the theory of the Board's affidavits (which it says it ignored) that all that was required to comply with the original order was "one simple countermanding order * * *, namely., a direction that the takeover originally planned for the close of business, June 24, 1950, was in consequence of a restraining order of this Court, required to be indefinitely postponed." [R. 161]. The suggestion wholly ignores the voluminous affidavits (on which the court says it did rely) showing the legal and practical impossibility of stopping the passage of title by any such "one simple countermanding order" and outlining the extensive and time-consuming steps which would have been necessary to accom-

Furthermore, the court passed over without discussion the following facts and circumstances, consideration of which is absolutely essential to a decision in this case:

(1) The court did not discuss the legal effect of the absence of any evidence whatever that either Transamerica or the Bank of America had violated Section 7 of the Clayton Act in the purchase of the stock or assets of the 22 banks in question or otherwise. The complaint in the Section 7 proceeding contained a general charge of violation by Transamerica only on which the Board had not completed hearings. There was no finding by the Board or the court that such uncompleted testimony constituted even a prima facie case. On the contrary the record showed that the Comptroller had considered the competitive situation and had approved the opening of Bank of America branches as successors to the Transamerica majority owned banks. Nevertheless the court deprived petitioners, as well as the selling banks which were not parties, of their contract rights and the control of their property merely because the Board's solicitor represented that such an order was necessary. There was no discussion of the grave question of due process involved in taking property without any factual showing of probable violation of the Act and probable necessity.

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plish a retransfer of title if such a retransfer had been required by the court's order.

The court assumes that Transamerica had a voting permit under 12 U.S.C. § 61 pursuant to which it might have voted at shareholders' meetings to reconstitute the boards of directors of the selling banks [R. 163]. The assumption is flatly inconsistent with the uncontradicted facts as shown by the record [R. 306-307].

By a casual reference in a footnote to its opinion of July 10th, the court accepts the assertions of the unverified complaint of the Board in the Clayton Act proceeding as indicating "the existence of probable cause for the proceeding" and as disclosing "a case within the jurisdiction of the Board." [R. 165] The court thus summarily purports to determine two major issues in the pending Clayton Act proceeding without any supporting evidence or finding or order of the Board and in flat contradiction of the only evidence in the record [R. 290-293; 305, 308; 339].

(2) In issuing the injunction the court found the balance of convenience against petitioners. But it did not require the Board even to explain how it would be inconvenienced, or what contemplated orders not yet issued would be frustrated.

The court does not discuss on what basis actions of Bank of America, which is not a party to the proceedings before the Board, can be enjoined without any factual showing against it. The opinion apparently assumes that Transamerica controls the Bank of America. But no evidence to support such an assumption was offered before the court and no finding to that effect has been made by the Board at the hearing. The evidence in this record is completely to the contrary [R. 290-293; 305, 308; 339].

Thus, without any discussion of the far-reaching consequences of such a decision, without requiring proof of a prima facie case, without permitting compulsory process, cross-examination, oral testimony or depositions, without requiring prior completion of administrative action, and in advance of any findings or order of the administrative agency, the court reached the conclusion that the mere claim of an administrative agency that some person, whether or not a party to a pending administrative proceeding, is interfering with the court's possible future jurisdiction to review an agency order, if one is ever made, is sufficient ground on which to base an *ex parte* restraining order and immediate injunction more drastic than any which has been sought in the uncompleted administrative proceeding.

Specification of Errors to be Urged.

1. The Court of Appeals had no jurisdiction to enter the temporary restraining order, the injunction, or the civil contempt order.

2. The court erred in holding that its contingent power to review Board orders enables it to intervene by injunction in aid of an incomplete administrative proceeding in

advance of any administrative order and without evidence that such an order is probable, by supplying to the administrative agency a power not vested in it by law.

3. The court erred in failing to hold that the Board has no authority to maintain its administrative proceeding against Transamerica under Section 7 of the Clayton Act.

4. The court erred in holding that it had jurisdiction (a) to prevent the dissolution and liquidation and to compel the operation of banks (not parties to the administrative or court proceedings) whose directors and shareholders wish to liquidate them; (b) to prevent the purchase of such banks' assets and businesses by another bank (not a party to the administrative proceeding) where not accompanied by a sale of stock and where after such sale the Board and the court retain just as much power as before to require the alleged violator of Section 7 to divest itself of any bank stock holdings and interest in the assets of such banks, which may be found to constitute a violation; (c) to prevent, upon collateral attack, the establishment of branches of a national bank at locations authorized by the Comptroller.

5. The court erred in holding that an injunction was necessary to avoid frustrating the jurisdiction of the Board or the court.

6. The court erred in not holding that the Board came into court with unclean hands and was estopped to question the proposed transactions.

7. The court erred in holding that the Board had statutory authority and standing to bring the action for injunction and to appear by its own counsel without the appearance of the United States Attorney or the Attorney General.

8. The court erred in entering the temporary restraining order without notice and without requiring the kind of showing concerning irreparable injury and impossibility of

notice required of District Courts by Rule 65(b) of the Federal Rules of Civil Procedure.

9. The court denied petitioners due process (a) by refusing them the right to be tried on evidence by witnesses subject to cross-examination; (b) by denying them the right to compulsory process; and (c) by denying them the right to take depositions.

10. The court erred in finding numerous material facts contrary to the undisputed evidence.

11. The court acted arbitrarily and unreasonably in issuing its temporary restraining order, its injunction order and its order holding the petitioners in civil contempt, where the uncontradicted facts showed that the acts prohibited had already been completed prior to the issuance of the temporary restraining order, that the government agency requesting the injunction, despite longtime previous knowledge of the facts, had delayed taking action until rights of hundreds of thousands of third parties, in addition to petitioners, had vested, and that the government has an adequate remedy for the protection of any legitimate public interest through action in a district court under another statute.

12. The court erred in changing and expanding the fair meaning and intendment of its temporary restraining order and injunction order by subsequent interpretation, after positions had changed by operation of law, and after the facts and the parties' understanding of the original order had been fully disclosed to the court at the earliest possible opportunity and the court's concurrence had been indicated.

Reasons for Granting the Writ.

This case presents a number of questions of federal law which are of the greatest importance and which have never been decided by this Court or have been decided by the court below in conflict with the applicable decisions of this Court and of other circuits.

I. This case presents the only instance in which a United States Court of Appeals has issued a peremptory writ of injunction on original petition of an administrative agency in purported aid and enlargement of the jurisdiction of that agency and of its own possible future reviewing jurisdiction, where no order has been entered by the agency and the jurisdiction of the Court of Appeals has not attached and may never attach. Such assumptions of jurisdiction by the court below are inconsistent with the prior decisions of this Court, and fly in the face of the statutory distribution of various types of jurisdiction to various government agencies and courts.

A. The first basic question is whether the Courts of Appeals have the broad powers of equity courts of general jurisdiction or whether they are courts of limited jurisdiction whose powers are specifically defined by statute. The court below has in substance construed the "all writs section", 28 U.S.C. § 1651, as granting it original general equity jurisdiction. It has acted in advance of the filing of any review or enforcement petition with it, and even before any findings or order by an administrative agency. It has enjoined activities of people who were not parties to any administrative proceeding. In so doing it has acted in contravention of the rulings of this Court that jurisdiction of the Courts of Appeals attaches only at the end of the administrative process [*F. P. C.* v. *Metropolitan Edison Co.*, 304 U. S. 375], and contrary to Section 11 of the Clayton Act which vests jurisdiction in the court only after the filing with it of an application and transcript and after the court shall have caused notice to be served upon the *respondent* in the order. The Court of Appeals has acted in contravention of the rulings of this Court that Courts of Appeals are courts of limited jurisdiction and are governed by statute "prescribing the manner and extent of review." *A. F. of L.* v. *N. L. R. B.*, 308 U. S. 401, 404.

In deciding that the Court of Appeals may exercise original jurisdiction in advance of the filing with it of a tran-

script and a petition to review a final order of an administrative agency the court was in conflict with *In re N. L. R. B.* 304 U. S. 486. There this Court made it plain that the jurisdiction of a Court of Appeals under a review provision practically identical with those of the Clayton Act was severely limited and did not include injunctive jurisdiction even after the filing of a petition for review, in advance of the filing of the transcript of proceedings before the administrative agency. This Court there held that the Court of Appeals could not enjoin action which would defeat its jurisdiction, i.e., vacation of the order of the Labor Board in that case.

The necessity of jurisdiction "already existing" as a prerequisite to the issuance by the Court of Appeals of auxiliary writs under the "all writs section" was reiterated by this Court in *Adams* v. *U. S., ex rel. McCann*, 317 U. S. 269, where the court said, at p. 273:

> "In *Whitney* v. *Dick*, 202 U. S. 132, this Court held that where no proceeding of an appellate character is pending in a Circuit Court of Appeals, the authority to issue auxiliary writs does not come into operation."

And it may be noted that the decision primarily relied upon by the court below in this case [*West India Fruit & Steamship Co., Inc.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (C.A. 2d 1948)] involved a situation in which the district court, which issued the injunctive order, had a jurisdiction "already existing" at the time.

It has previously been held in some circuits that jurisdiction "already existing" is not an essential prerequisite to the issuance by a Court of Appeals of a writ of mandamus directed to a *lower court* whose orders are subject to its exclusive *appellate* review. The court below relied on cases of this character, e.g. *Barber Asphalt Paving Co.* v. *Morris*, 132 F. 945 (C.C.A. 8th 1904); *Whittel* v. *Roche*, 88 F. 2d 366 (C.C.A. 9th 1937). But no previous case has gone so far as to assert that Courts of Appeals have gen-

eral equity powers to enjoin parties or issue any extraordinary writs in advance of actual initiation of an original proceeding to review a decree entered in administrative proceedings.

The decision of the court below is of the utmost importance in defining the jurisdiction of Courts of Appeals and is plainly of importance to all administrative agencies and the parties before them. Unless review is had in this Court, administrative agencies may be expected to resort to Courts of Appeals frequently with petitions for interim injunctive relief in advance of hearing, findings or order, and based upon bare allegations, without proof. The decision is an open invitation, for example, to the Federal Trade Commission, Interstate Commerce Commission, Civil Aeronautics Board and Federal Communications Commission to file similar petitions in aid of proceedings under Section 11 of the Clayton Act. Many other agencies of the government conducting proceedings under other statutes may be expected to resort to the procedure here devised. This will involve an enormous extension of the power of all administrative agencies and expansion of the duties of the Courts of Appeals and of this Court. It will encourage administrative evasion of the requirements of due process. It is inconsistent in principle with the established rule that the courts will not intervene in an uncompleted administrative proceeding at the instance of the private citizen, even where important rights of the citizen are being trampled upon by the administrative agency conducting the proceeding.[5]

B. The injunction was issued by a court which was merely one of two possible appellate courts in which a final order, if an objectionable one is entered, may be reviewed.

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[5] See *Transamerica Corporation* v. *McCabe*, 80 F. Supp. 704, in which the District Court for the District of Columbia refused, upon authority of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, to enjoin the Board of Governors in connection with the very proceeding now used as a basis for injunction at the instance of the Board.

Section 11 of the Clayton Act specifically authorizes review, as the court below recognizes, in either the Third Circuit (where Transamerica "resides") or the Ninth Circuit (where the alleged violation occurred). Thus, even if a final order is entered in the Board's proceedings against Transamerica, Transamerica may seek review in the Court of Appeals for either the Third Circuit or the Ninth Circuit. The Board may select either the Third Circuit or the Ninth Circuit, in the case of enforcement proceedings, but those proceedings may be had only after the respondent before the agency has failed or neglected to obey its order. Accordingly, the court below acted in aid of a jurisdiction which it does not now have, and which it may never acquire.

C. Another basic question is whether the Court of Appeals, at the instance of the Board, has assumed jurisdiction which is vested by Section 15 of the Clayton Act exclusively in the district courts, at the instance of the Attorney General. By 28 U. S. C. § 1337 (62 Stat. 931) "the district courts shall have original jurisdiction of any civil action or proceeding arising under any" of the antitrust laws. By 28 U. S. C. § 1348 (62 Stat. 933) the district courts also have "original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association." By 28 U. S. C. § 507 (63 Stat. 100) it is required that prosecution be by the United States Attorney or under supervision of the Attorney General. There is no comparable authorization in any of the statutes for the maintenance of such a proceeding in a Court of Appeals nor for its prosecution by the Board.[6]

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[6] Contrasting, for illustration, the absence of statutory authority in the Board to seek an injunction with that conferred upon the Securities and Exchange Commission, see 15 U.S.C. § 77 t (b): "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter * * *, it may in its discretion bring an action in any district court of the United States * * * to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond."

II. The decision of the court below is of the utmost importance in respect of its construction of the Clayton Act.

A. This case involves the first proceeding ever initiated by the Federal Reserve Board under Section 7 of the Clayton Act. It raises the question whether the Board has power to proceed under that section. The Board under Sections 8 and 11 of the Clayton Act is authorized to enforce compliance with the prohibition on interlocking directorates between a member bank and other banks. The legislative history shows that the Board's responsibilities under Section 8 were the sole reason for its being mentioned in Section 11.[7]

The structure of the act itself and of the banking legislation before and after the Clayton Act confirms this statement.[8]

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[7] As originally passed by the House, the Clayton Act contained in Section 9 a restriction upon interlocking directorates between banks similar to the restriction now contained in Section 8 (H. R. 15,657, 63rd Congress). As passed by the Senate this provision was stricken out and the enforcement section (comparable to present Section 11) omitted any reference to the Federal Reserve Board (see S. Report 698, pp. 12, 48, and Senate Documents, Vol. 25, 63rd Congress, 2d Session, pp. 10, 15). In conference the provisions relating to interlocking directorates were restored and the provision vesting enforcement authority "in the Federal Reserve Board where applicable to banks" was simultaneously inserted in Section 11 (*id.*).

[8] (a) Consolidations and mergers of national banks and of state banks (whether members or not) with national banks require approval of the Comptroller of the Currency and not the Board (12 U.S.C. §§ 33, 34 and 34(a)).

(b) The Reserve Act provides that a state bank becoming a member "shall retain its full charter and statutory rights as a state bank * * *, and may continue to exercise all corporate powers granted it by the state in which it was created, * * *." (Among those powers may be, and in California is, the right to operate branches on a statewide basis). This is subject *only to the provisions of the Reserve Act* and not the Clayton Act (12 U.S.C. § 330; 31 Opinions, Attorney General 153.)

(c) By the Banking Act of 1933 national banks, subject to the approval of the Comptroller of the Currency and not the Board, are given the same right to establish and operate branches in the various states as are given to state banks by the state laws (12 U.S.C. § 36).

The Board is unlike the other agencies mentioned in Section 11 in that it does not have compulsory process and is not equipped to hold adversary proceedings dealing with the complex questions of restraint of competition, which are involved in Section 7. The Board's proceeding therefore poses the serious question whether an antitrust decree based upon complicated issues of fact may properly be entered on a record made without compulsory process.

Although the Clayton Act has been on the books for 36 years, the Board has never attempted to hold such a proceeding before. Its officials drafted and argued for bank holding company legislation as a means of dealing with what they conceive to be the problems of bank holding companies. Before the Congress they have expressly stated that the Board had no authority to prevent acquisition of stock ownership in banks by Transamerica.[9] This Court has recognized the significance of such a practical administrative interpretation as indicating a probable absence of jurisdiction. *F. T. C.* v. *Bunte Brothers, Inc.*, 312 U. S. 349. A reversal of this longstanding administrative construction raises an important question concerning the Board's jurisdiction. Since the Board has sought the aid of the courts to assist its administrative proceeding, it must establish that it has jurisdiction. *F. P. C.* v. *Panhandle Eastern Pipeline Co.*, 337 U. S. 498, 515.

B. The decision below is in conflict with the holding of this Court in *Arrow-Hart & Hegeman Electric Co.* v.

[9] See testimony by Reserve Board Chairman Eccles April 5, 1943 Hearings before the Committee on Banking and Currency, House of Representatives 78th Congress, 1st Session, on H. R. 1699, p. 133; see also similar testimony by F.D.I.C. Chairman Crowley (*id.* p. 37). J. Leonard Townsend, counsel for the Board of Governors of the Federal Reserve System, gave further testimony on September 20, 1945 supporting a proposal to amend Sections 7 and 11 of the Clayton Act, in which he recognized that the Board had no authority under the Clayton Act as now drawn with respect to "any merger, combination, purchase, and so forth, of competing organizations * * *." (Hearings before Subcommittee No. 3 of the Committee of the Judiciary, House of Representatives, 79th Congress, 1st Session, on H. R. 2357, p. 337.)

F. T. C., 291 U. S. 587. In that case, this Court held that Section 7 of the Clayton Act did not authorize the Federal Trade Commission to order reversal of an acquisition of assets in controlled companies, where the acquisition was effected while proceedings were pending before the Commission. In the present case, the decisions of the court below enjoined an acquisition of assets merely alleged but not proved to be of that character, and required that the acquisition be reversed in advance of any finding or order of the Board that it was unlawful, and even in advance of opportunity for review of its order by this Court.

The theory of the Board and the court below is that by such an order the assets will be frozen in the possession of the selling banks, so that if the Board should thereafter by final order require a disposition of the assets as well as the stock of the selling banks, such divestment of the assets might then be sustained, on proper proof, upon authority of *F. T. C.* v. *Western Meat Co.*, 272 U. S. 554.[10] In substance, the Board, with the approval of the court below, has contrived a procedural device for overruling the *Arrow-Hart & Hegeman* case. The result is one which has been

[10] The *Western Meat* case is not a valid authority for the proposition for which it is cited by the court below. It prohibited only an acquisition of assets by the violator itself instead of a divestment, as here, by a majority owned company to a third party in which the alleged violator owns only a small minority non-controlling stock investment, and as to which there is no evidence of control by the alleged violator. This Court held in the companion case of *Thatcher Mfg. Co.* v. *F. T. C.*, 272 U. S., at 561 (contrary to the decision of the Ninth Circuit in this case), that the Clayton Act did *not* authorize the Commission to require a divestment of "a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held." In that event, said the court, the remedy is "through the courts" under the Sherman Act. Moreover, the subsequent judicial history of the *Western Meat* case shows that the violator, who was there prohibited from buying assets, subsequently acquired the assets in question with the approval of the Ninth Circuit Court of Appeals. *Western Meat Co.* v. *F. T. C.*, 33 F. 2d 824, 827 (cert. granted but later dismissed on motion of the Solicitor General, 281 U. S. 771).

urged upon Congress, so far unsuccessfully, by the Federal Trade Commission. To permit the device to succeed will be to rewrite Section 7 of the Clayton Act after Congress has refused repeated requests to do so. The question is of the utmost consequence in the administration of the Clayton Act.

C. The orders below are predicated upon an unprecedented theory that the Board has authority under the Clayton Act to forbid the voluntary dissolution and liquidation of a bank in the manner expressly permitted by the banking laws. Banks would thus be treated as if they were public utilities.

This Court has said that even:

> "The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon." *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 543.

A bank has not assumed such an obligation. A national banking association is given specific authority to conduct a voluntary dissolution upon the vote of a two-thirds majority of its shareholders (U. S. R. S. § 5220, 12 U. S. C. § 181). In commenting on this section, the court in the case of *Green* v. *Bennett*, 110 S. W. 108 (Tex. 1908), denied an injunction petition by a minority stockholder and said, at p. 115:

> "It is provided by section 5220, Rev. St. U. S., with reference to National Banks, that: 'Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.' *No limitations are to be found in the national banking laws upon this broad power.*" [Emphasis added.]

State banks are equally free to discontinue doing business. In discussing this question the court said, in the case of *Second Nat. Bank* v. *Old Guaranty Sav. Bank*, 84 N. H. 342, 150 Atl. 737 (1930), 150 Atl. at p. 738:

> "It is difficult to see wherein there is a public interest which places a savings bank under public obligation to continue in business so long as it may be solvent and properly managed, once it has commenced business. No authority is cited for the proposition and no argument is advanced for it beyond its assertion. What is meant in saying that a savings bank is affected with a public interest is vague and indefinite. There is a public interest to have savings banks successful, but that interest is no indication of public right to have them continue to do business while they remain successful."

And further, at p. 738:

> "A savings bank is essentially a private undertaking. It is privately managed and privately owned, and it has no duty of public service."

Yet, the Court of Appeals in this case has ordered 22 banks, which had begun dissolution and liquidation, to resume and continue their business.

III. The court below proceeded in an arbitrary and illegal manner and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. The showing made before the court below was merely that an administrative proceeding under Section 7 of the Clayton Act was pending before the Federal Reserve Board. The petition also contained a conclusion that the transactions in question, if consummated, would deprive the Board and the court of jurisdiction to order disposition of the stock of the banks in a manner inconsistent with the proposed transaction. It was not stated that the Board intended to make such an order or indeed any order. It did not allege that the Board had evidence, either in its Clayton Act proceeding or otherwise, that such an order would be appropriate. No affidavits were submitted by the Board to support the injunction petition, other than counsel's veri-

fication of the petition on information and belief. In opposition, extensive affidavits were made, showing that there was no basis for the Clayton Act proceeding, that the transaction in question did not interfere with the Board's jurisdiction, and that the sale of the banking business in question was perfectly lawful [e.g. Stewart, R. 290-293; Husbands, R. 305, 307-308; Giannini, R. 339-340; 348-349].

The court below relied for precedent on *West India Fruit & Steamship Co., Inc.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775, (C. A. 2d 1948). That case was begun in a district court by a complaining carrier against a competitor alleging illegal rates and seeking an injunction. Thereafter the Maritime Commission intervened and also asked for an injunction pending the exercise of its express jurisdiction over rates. Six ports also intervened alleging prejudicial effects upon them of the rate cuts involved. The Court of Appeals did not discuss the evidence presented below. However, extensive evidence was presented establishing a prima facie case of violation of law and irreparable injury and the court below did make findings on both of these issues. In such circumstances the *district* court was held to have authority, pursuant to its general equity powers, to preserve the status quo pending the conclusion of the administrative proceeding. However, the Court of Appeals stated that in the exercise of his discretion "the trial judge was obliged, of course, to balance the harms the injunction might do to the respective parties" and that his decision was not erroneous in view of the statutory provision for awarding damages by the Commission for the injuries caused by any violation of the law (170 F. 2d, at p. 779).

In the previous case of *S. E. C.* v. *Long Island Lighting Co.*, 148 F. 2d 252 (C. C. A. 2d 1945),[11] the Second Circuit had affirmed a district court's denial of an injunction at the behest of an administrative agency. In that case even the dissenting judge, whose views were apparently ap-

[11] Reversed and remanded with directions to dismiss the case as the cause had become moot 325 U. S. 833.

proved in the *West India* case, rested his conclusion upon conditions "rather strongly indicated prima facie" and upon a very careful consideration of the equities.

California v. *Latimer, et al.*, 305 U. S. 255, is authority in this Court for the proposition that an injunction should only be granted upon a clear showing of irreparable injury.

In the present case, tried in a statutory reviewing court, without benefit of the administrative record, the completion and filing of which is a prerequisite to the exercise of its statutory jurisdiction, there was no attempt to prove that the acquisition of the assets of these banks by Bank of America would in any way cause a lessening of competition or tend to create a monopoly. There was no attempt to overcome the showing of injury to petitioners or to hundreds of thousands of the general public in restraining the consummation of the agreements of purchase and sale.

Plainly if an action had been presented in a district court by the United States by a complaint under Section 15 of the Clayton Act making the same allegations as the Board's petition, pendente lite relief could have been obtained only by an affirmative showing that a prima facie violation of Section 7 was involved, that the proposed transactions would in fact interfere with the application of appropriate sanctions and that the standards for equitable relief had been met. *DeBeers Consolidated Mines Ltd.* v. *United States*, 325 U. S. 212, 218, 219. See also: *United States* v. *Paramount Pictures*, 334 U. S. 131, 151. The Board neither took, nor did the court below impose, any such burden. It permitted no balancing of equities.

Such an order goes far beyond what the Second Circuit permitted a district court to do in the *Seatrain* case and, in fact, denies the basic conclusion of that case—that even a court authorized to grant an injunction pending the outcome of an administrative proceeding "was obliged, of course, to balance the harms the injunction might do to the respective parties."

Plainly the decision, unless reversed grants administrative agencies absolute power by the mere issuance of com-

plaints to stop all transactions which they might conceivably enjoin by final order, without the necessity of making any showing whatsoever that the public interest will be injured—a power much greater than that possessed by any court, even under the Clayton Act where the district courts and the administrative agencies have concurrent jurisdiction. *United States Alkali Export Association, Inc.* v. *United States*, 325 U. S. 196, 203, 207-209. Such a principle would make the courts mere rubber stamps to grant preliminary injunctions on request and without proof of necessity.

The notion that an administrative agency should have injunctive aid to postpone business transactions, while it investigates "its own power and the necessity of using it," was rejected by this Court last year in *F. P. C.* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 515.[12]

B. The court below issued a temporary restraining order without the safeguards which this court has demanded as minimum standards of fairness of all district courts in Rule 65(b) of the Federal Rules of Civil Procedure. It required no showing that notice could not have been given. In fact, notice could have been given readily and the failure of the Board to give notice and of the court to require it was unjustifiable.

C. The injunction order and civil contempt order were made without according the petitioners the right of compulsory process, cross-examination, and oral testimony. One party was even denied a reasonable opportunity to obtain new counsel, when counsel originally retained to represent him collapsed under the pressure imposed by the court. Access to important available evidence in the hands of the Board and its officials was denied the petitioners. The denial of due process was no less drastic than that which was

[12] For a more complete discussion of the Board's failure to make a prima facie showing of facts to justify injunctive relief, we respectfully refer to the petition of Bank of America requesting a writ of certiorari to review the same orders.

found by this Court to require a reversal in *In re Oliver*, 333 U. S. 257, 275.

The court restricted the proceedings to affidavits. Although it purported to decide the case exclusively on petitioner's showing, in fact it decided issues of consequence in direct contravention of affidavits of the petitioners. On the question of the trial of injunction and contempt by affidavit, the practice of the Ninth Circuit here involved is in conflict with the rulings of the Sixth and Eighth Circuits. See *N. L. R. B.* v. *Rath Packing Co.*, 123 F. 2d 684, 685 (C. C. A. 8th 1941); *Cohn* v. *Kramer*, 136 F. 2d 293 (C. C. A. 6th 1943); cf. *Sims* v. *Greene*, 161 F. 2d 87 (C. C. A. 3d 1947).

D. The court granted relief at the behest of a government agency on the basis of erroneous statements of fact made to it on behalf of that government agency and later established to be erroneous. The government agency did not come to court with clean hands, for it had stood by for more than two months and watched the transactions in question proceed to the point of completion before it launched its unheralded and unprecedented attack. Meanwhile, rights had vested; rights of Transamerica and its 140,000 stockholders, and rights of minority stockholders of the 22 selling banks to retire from the banking business and realize the benefits of an advantageous liquidation; rights of the 130,000 depositors of the selling banks; rights of the purchasing bank and its stockholders; rights of the 125,000 investors who purchased a new $71 million issue of stock in reliance on the public representation that the funds would make possible the advantageous establishment of new branches. In these circumstances the Board had no standing as a matter of law to request relief and it was arbitrary and unreasonable for the court to grant such relief.

E. The action was taken at the behest of an agency which has no authority to sue and be sued and no authority or standing to petition a Court of Appeals except, if it has jurisdiction under Section 7, to enforce a final order (non-

existent here) which a respondent before it has refused to obey. No statute gives the Board authority to bring action in any court except after final order under Section 11 of the Clayton Act. Its powers do not extend so far. 12 U. S. C. § 248.

F. The Board, if it had authority to appear in court except under Section 11 of the Clayton Act could do so only through the Department of Justice. In holding to the contrary the court below decided this question in direct conflict with a decision of the Second Circuit in *Sutherland, Alien Property Custodian*, v. *International Ins. Co. of New York*, 43 F. 2d 969 (C. C. A. 2d 1930), cert. denied 282 U. S. 890; cf. *S. E. C.* v. *Robert Collier & Co.*, 76 F. 2d 939 (C. C. A. 2d 1935).

IV. This case presents an important question of the right of one agency of government, the Federal Reserve Board, to make a collateral attack upon the action of another agency of the government, the Comptroller of the Currency, when, as here, the latter was acting within his exclusive jurisdiction under 12 U. S. C. § 36 to authorize the establishment of branches by a national bank at the locations of each of the selling banks. It was conceded below and it is established that the Comptroller's determinations upon matters committed to his jurisdiction may not be collaterally attacked [R. 539; 612]. See *Casey* v. *Galli*, 94 U. S. 673, 681; *Schechter* v. *Sherwin*, 81 F. 2d 603, 605 (C. C. A. 7th, 1936); *Benedict* v. *Anderson*, 70 F. 2d 227, 229 (C. C. A. 6th, 1934). In exercising that jurisdiction the Comptroller, as pointed out *supra*, pp. 6, 7, considered the transactions from all points of view relating to the public interest. Not only did he specifically consider the national policy with respect to competition among banks [R. 254-255], but his consideration of the public interest was required to take that policy into account. 12 Code Fed. Reg. § 4.5; *National Broadcasting Company* v. *United States*, 319 U. S. 190, 222-

224; cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86-88.

The Board has here obtained from the court below an order prohibiting Bank of America from operating branches at the places where the Comptroller of the Currency has held that it is in the public interest that branches be operated by Bank of America as successors to the selling banks. The conflict or, as the court below stated, the "unfortunate working at cross purposes" of two government agencies presents an important question which has not been and should be resolved by this Court.

V. The issues here involved are of great importance and the affected interests of the general public are substantial. The court's decision enables one agency of the government to frustrate performance by another agency of the government of the latter's valid commitment to 125,000 investors who purchased $71 million of bank stock in reliance on the good faith of the government. The particular transaction involves the interests of over 130,000 depositors with approximately $160 million deposits in 22 banks. The decision below was made by a Court of Appeals as an original matter without any previous lower court action or completed administrative proceeding. None of the questions presented has had any appellate review. This Court presents the only possibility of any appellate review.

CONCLUSION.

For the reasons stated, the petition for writ of certiorari should be granted.

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September 20, 1950.

APPENDIX.

Section 7 of the Clayton Act [15 U. S. C. § 18] reads in pertinent part as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such asquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

Section 8 of the Clayton Act, [15 U. S. C. § 19] reads in pertinent part as follows:

> "No private banker or director, officer, or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer, or employee of any other bank, banking associa-

tion, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof; but the foregoing prohibition shall not apply in the case of any one or more of the following or any branch thereof:

"(1) A bank, banking association, savings bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

"(2) A bank, banking association, savings bank, or trust company which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

"(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to section 25 of the Federal Reserve Act.

"(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

"(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town, or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

"(6) A bank, banking association, savings bank, or trust company not engaged in a class or classes of business in which such member bank is engaged.

"(7) A mutual savings bank having no capital stock.

"Until February 1, 1939, nothing in this section shall prohibit any director, officer, or employee of any member bank of the Federal Reserve System, or any branch thereof, who is lawfully serving at the same time as a private banker or as a director, officer, or employee of any other bank, banking association, savings bank, or trust company, or any branch thereof, on the date of enactment of the Banking Act of 1935, from continuing such service.

"The Board of Governors of the Federal Reserve System is authorized and directed to enforce compliance with this section, and to prescribe such rules and regulations as it deems necessary for that purpose.

"From and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

"When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his

eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment."

Section 11 of the Clayton Act [15 U. S. C. § 21] reads as follows:

"Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Authority where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed

in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission

or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

"Complaints, orders, and other processes of the commission or board under this section may be served by

anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same."

Section 15 of the Clayton Act [15 U. S. C. § 25] reads as follows:

"The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof."

28 U. S. C. § 507. Duties; supervision by Attorney General.

(a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:

(1) Prosecute for all offenses against the United States;

(2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned;

* * *

(b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys appointed under section 503 of this title, in the discharge of their respective duties.

28 U. S. C. § 1337. Commerce and anti-trust regulations.

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U. S. C. § 1348. Banking association as party.

The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

12 U. S. C., Sec. 36 in pertinent part reads as follows:

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks . . .

"(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

"(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

* * *

"(h) The words 'State bank', 'State banks', 'bank', or 'banks', as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

Code of Federal Regulations, 1949 Edition. Title 12—Banks and Banking, Chapter 1—Comptroller of the Currency.

§ 4.5 *Authorizing branches and seasonal agencies*—(a) *Branch banks.* (1) Under the provisions of R. S. 5155, as amended; 12 U. S. C. 36, national banks may, subject to the approval of the Comptroller of the Currency, establish and operate branches and seasonal agencies. Upon receipt of an application from a national bank or any bank operating in the District of Columbia, for a branch or seasonal agency, the appropriate District Chief Examiner is instructed to make an investigation, taking into consideration the financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the number of branches now in operation and their location, the proposed location of the new branch and the distance from the head office, the nearest banking facilities, the convenience and needs of the community to be served by the new branch, the nature of the potential clientele and possible business available, including an estimate of contemplated volume within a reasonable period of time and the prospects of successful operation of the branch, together with any other pertinent factors.

(2) The examiner's report is submitted to the District Chief Examiner who forwards it to this office with his own comments and recommendation. The information and data is analyzed, briefed and routed in the same way as an application for a charter.

(3) If the decision is unfavorable the applicant bank is so notified. If the decision is favorable the Comptroller issues a formal certificate evidencing his approval and consent to the establishment and operation of a branch bank at the designated location.

(b) *Removal of branch banks or branch offices.* A branch of a national banking association may not be moved from one location to another without first obtaining the consent and approval of the Comptroller. The procedure for obtaining consent to such a moving of the location of a branch follows the same general course as that of the application for a branch, although the information required

on any investigation made will vary with the circumstances and reasons given for the proposed move. If the approval is granted the Comptroller executes a formal statement to that effect, which is forwarded to the bank applying therefor.

12 U. S. C. § 24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * *

Seventh. * * * The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, co-partnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. * * *

12 U. S. C. § 181. Voluntary dissolution; appointment and removal of liquidating agent or committee; examination.

Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. The shareholders shall designate one or more persons to act as liquidating agent or committee, who shall conduct the liquidation in accordance with law and under the supervision of the board of directors, who shall require a suitable bond to be given by said agent or committee. The liquidating agent or committee shall render annual reports to the Comptroller of the Currency on the 31st day of December of each year showing the progress of said liquidation until the same is completed. The liquidating agent or committee shall also make an annual report to a meeting of the shareholders to be held on the date fixed in the articles of association for the annual meeting, at which meeting the shareholders may, if they see fit, by a vote representing a majority of the entire stock of the bank, remove the liquidating agent or committee and appoint one or more others in place thereof. A special meeting of the shareholders may be called at any time in the same manner as if the bank continued an active bank and at said meeting the shareholders may, by vote of the majority of the stock, remove the liquidating agent or committee. The Comptroller of the Currency is authorized to have an examination made at any time into the affairs of the liquidating bank until the claims of all creditors have been satisfied, and the expense of making such examinations shall be assessed against such bank in the same manner as in the case of examinations made pursuant to sections 481-485 of this title.

Califoria Banking Code.

§ 2050. Sale of business authorized. Any bank or trust company may sell (a) the whole of its business, or (b) the whole of the business of any of its departments, or (c) the whole of the business of any of its branches, or (d) the whole of the business of any department of any branch, to any other bank which may purchase the same upon compliance with the provisions of this article.

§ 2051. Agreement of purchase and sale: Provisions. The selling and purchasing banks shall enter into an agree-

ment of purchase and sale which shall contain all the terms and conditions of the sale and contain proper provision for the payment of all liabilities of the selling bank, or of the department, branch, or branch department sold, and proper provision for the assumption by the purchasing bank of all fiduciary and trust obligations of the selling bank, or department, branch, or branch department sold. The agreement may provide for the transfer of all deposits of the selling bank or of the department, branch, or branch department sold to the purchasing bank, subject to the right of every depositor of the selling bank or of the department, branch, or branch department so sold to withdraw his deposit in full on demand after such transfer, irrespective of the terms under which it was deposited with the selling bank, and may provide for the transfer of all court and private trusts so sold to the purchasing bank, subject to the rights of all trustors and beneficiaries under the trusts so sold after such transfer to nominate another or succeeding trustee of the trust so transferred.

§ 2052. Same: Approval by shareholders: How consent to be evidenced: Consent of national banking association. The agreement of purchase and sale must be approved by shareholders holding of record at least two-thirds of the issued shares of stock of each bank respectively, such consent to be evidenced either in a writing signed by the shareholders or by a vote at a shareholders' meeting of each of such banks called for the purpose of acting upon such agreement. If either of such banks is a national banking association, its consent shall be given and evidenced in such manner as may be provided by the laws of the United States applicable thereto.

§ 2053. Same: Filing with superintendent: Certification of approval or consent: When agreement effective: Publication of notice of agreement: Affidavit of publication. When the agreement has been executed by the appropriate officers of each of the banks pursuant to authority conferred by the board of directors of each bank respectively and when the same has been approved by the requisite number of shareholders, the original or a duplicate original thereof shall be filed with the superintendent. There shall be attached to the agreement filed with the superintendent certificates executed by the secretary of each of the banks respectively, certifying that the agreement has been approved

by the required number of shareholders of the bank of which he is secretary in the manner herein provided, or if the bank is a national banking association a certificate executed by its secretary certifying that its consent has been given in the manner required by the laws of the United States. Such agreement shall not become effective until it has been approved in writing by the superintendent. * * *

§ 2056. **Purchasing bank to succeed to relations, obligations, trusts and liabilities of selling bank.** Except as otherwise provided in this article, neither the rights of creditors nor any liability or obligation for the payment of money nor any claim or cause of action against the selling bank shall be in any manner released or impaired by the sale and the rights, obligations, and relations of all creditors, depositors, trustors, and beneficiaries of trusts and of all other persons shall remain unimpaired by the sale, but the purchasing bank shall succeed to all such relations, obligations, trusts, and liabilities and shall be liable to pay, discharge, and perform all such debts and obligations and to perform all trusts of the selling bank in the same manner as if the purchasing bank had itself incurred the debt or obligation or had assumed the relation of trust, and the purchasing bank shall succeed to all rights, offsets, and defenses of the selling bank in connection therewith.

§ 2057. **Superintendent to fix time when agreement to be effective: Effect.** Upon the approval by the superintendent of an agreement of purchase and sale he shall fix a time when such approval shall be effective and *at such time the purchasing bank or trust company ipso facto and by operation of law and without further transfer, substitution, act, or deed succeeds to all rights, obligations, properties, assets, investments, deposits, demands, and agreements covered by the agreement*, and to all trusts of the selling bank or of the department or branch sold or of the department of the branch sold and to all properties, assets, investments, agreements, rights, and obligations of the selling bank or trust company under all trusts, executorships, administrations, guardianships, agencies, and all other fiduciary or representative capacities to the same extent as though it had originally assumed, acquired, or owned the same and succeeds to and is entitled to take and execute the appointment of all executorships, trusteeships, guar-

dianships, and other fiduciary and representative capacities to which the selling bank or trust company may be named or is thereafter named in wills, whenever probated, or to which it is or may be named or appointed by any other instrument. [Emphasis added]

§ 3150. Notice to superintendent: Liquidation of affairs: Disposition of unpaid deposits: Possession of business and property by superintendent: Dissolution of corporate existence. Any bank which voluntarily has ceased to do a banking business shall immediately notify the superintendent thereof and shall then proceed to liquidate its affairs. Any deposit or other sum which has not been paid to the person entitled thereto within six months after the bank ceased to conduct a banking business shall be paid into the State Treasury in the manner and for the purposes provided in Section 3121. If the superintendent has reason to conclude that the liquidation of such bank is not being safely or expeditiously conducted he may take possession of the business and property of such bank in the same manner and with the same effect and subject to the same rights accorded the bank as if he had taken possession pursuant to the provisions of Article 1 of this chapter and proceed to liquidate its affairs in the same manner as provided in Article 1 of this chapter. When such bank has been completely liquidated its corporate existence shall be dissolved in the manner provided by law.

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IN THE

Supreme Court of the United States

October Term, 1950

No.

BANK OF AMERICA NATIONAL SAVINGS AND TRUST ASSOCIATION, AND L. M. GIANNINI, *Petitioners*,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review orders of the United States Court of Appeals for the Ninth Circuit, issued June 23 and June 24, 1950, granting a temporary restraining order and an injunction against petitioners, and an order of that court, issued July 13, 1950, adjudging petitioners guilty of civil contempt of the aforesaid orders and impliedly refusing to dissolve said orders of June 23 and 24, 1950.

Opinions Below.

The court below issued two opinions. On June 27, it issued an opinion relating to the issuance of its injunction order of June 24, 1950 (R. 72-82). On July 10, 1950, the court issued its opinion with respect to the contempt proceedings and motions to vacate the injunction order (R. 155-166). These opinions are unreported.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented.

1. Does a United States Court of Appeals have authority to issue an injunction on original petition of an administrative agency in alleged aid of uncompleted proceedings pending before that agency, in which no findings or order of any kind have been made by the agency?

2. If the Court of Appeals has such jurisdiction, may it issue an injunction against persons not parties to the adminstrative proceeding, on the mere showing by the agency of the pendency of the administrative proceeding and without requiring a prima facie showing that there has been a violation of law and that injury will in fact result to the public interest unless the injunction is issued?

3. May transfers of assets unaccompanied by acquisitions of stock be enjoined in aid of an uncompleted proceeding under Section 7 of the Clayton Act?

4. May the Federal Reserve Board seek and obtain relief having the effect of requiring petitioner Bank of America not to establish bank branches whose establishment has been specifically authorized by the Comptroller of the Currency?

We also adopt the questions presented in the petition of Transamerica Corporation filed in this Court petitioning for a writ of certiorari from the same orders review of which is sought herein.

Statutes Involved.

The pertinent provisions of Sections 7 and 11 of the Clayton Act and the pertinent provisions of the banking laws, relating to the jurisdiction of the Comptroller of the Currency, are printed in Appendix A to this petition.

STATEMENT OF THE CASE.

In the proceeding below the Court of Appeals exercised the original jurisdiction of a court of equity on a petition filed with it by the Board of Governors of the Federal Reserve System (R. 74, 75, 3-7).

The Board has pending before it an uncompleted proceeding under Section 7 of the Clayton Act against Transamerica C rporation in which no order of any kind has been entered. It filed an original petition in the Court of Appeals for the Ninth Circuit against Transamerica Corporation and also against Bank of America although the Bank was not a party to the administrative proceedings. The petition sought and the Court granted an injunction against the acquisition by the Bank of America of the assets of 22 banks in California. Transamerica owns a majority of the stock of these 22 banks (R. 3, 4, 301) and 11% of the stock of Bank of America (R. 305, 309).

The assets having already been acquired, the court issued a subsequent order compelling the petitioner Bank of America to restore them to the original owners (R. 176). The court further enjoined petitioner from operating branches the establishment of which had been approved by the Comptroller of the Currency at the locations of the 22 banks whose assets had been purchased (R. 174-177, 612). The rights of the petitioner thus seized and sequestered are valued in millions of dollars.

The injunction was entered, as we shall show, without color of jurisdiction and without any showing of illegality or of even a prima facie case that the transactions might be contrary to law. The injunction was issued solely on a

showing that an administrative proceeding under Section 7 of the Clayton Act was pending before the Board against Transamerica Corporation (R. 1-7, 81). The Board's theory was that the selling banks' disposal of their assets might frustrate a possible future effort by the Board to compel Transamerica to dispose of its stock in the 22 banks (R. 77).

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The petitioner Bank of America National Trust and Saving Association, hereinafter referred to as Bank of America, is a national banking association operating in the State of California. Petitioner L. M. Giannini is its president. Bank of America is an important competitive force in the world of banking credit and finance. It has grown as a result of policies and methods particularly designed to serve workingmen and small businessmen. Today it serves more than 4,250,000 deposit accounts of which more than 2,000,000 have average bank balances of $100 or less (R. 349). This has required the operation of a system of branches throughout the State of California including many small communities which could not adequately be served by a separate unit bank. Each such branch has been opened with the approval of the Comptroller of the Currency, whose duty it is to make an exhaustive investigation not only of the financial character and ability of each branch, but also of the effect of the acquisition of said branches in maintaining competition in the banking field. 12 U. S. C. § 36, 12 C. F. R. § 4.5.

In accordance with its long established policy of competitive development of a branch banking system which can offer the public statewide service, Bank of America since January 1945 had sought and prepared to acquire the assets of various of the twenty-two banks involved in the court's injunction and operate branches at the locations of those banks.

It had filed applications for this purpose with the Comptroller of the Currency (R. 258-260). In the early months of 1950, the Comptroller had made a thor-

ough investigation of these applications (R. 260-261, 254). On April 14, 1950, he determined to grant permits to conduct branches of petitioner bank at the location of each of the selling banks, and committed himself to issue the necessary permits on condition that the petitioner bank first complete the raising of $70,000,000 of additional capital (R. 37, 64, 65).

Relying on the Comptroller's announced intention to grant the permits, Bank of America floated an issue of over $71,000,000 of its stock by public subscription. 125,000 members of the investing public subscribed to this stock on the representation that the funds raised would be used in part to acquire additional branches (R. 37, 263-265). Binding contracts to purchase the assets and banking businesses of the 22 banks were entered into. These were contracts of present sale (R. 40-43, 33, 54-57, 34). Formal permits from the Comptroller of the Currency (R. 34, 60, 66-68) and the Superintendent of Banks of the State of California (R. 32, 39, 40) were received. All of these actions took place before the restraining order herein was served at 4 P.M. on Friday June 23, but in the case of the state banks, the approval of the State Superintendent of Banks provided that title would pass at the close of business Saturday, June 24.

By the time the restraining order was issued on Friday, June 23, Bank of America had notified the 130,000 depositors or the selling banks that on the following Monday these 22 banks would open as branches of the Bank of America (R. 34-36, 60-62, 272) and the personnel of the banks had been trained by Bank of America supervisors in methods of operation as a branch bank (R. 337, 325, 297).

From the beginning of these transactions the Federal Reserve Board had full knowledge of the contemplated purchases. In April, over two months before it filed its petition in the Court of Appeals, the Board had been notified by the Comptroller of the Currency of his intention to approve the operation of branches at the locations in question (R. 255).

The first notice received by petitioners of any objection by the Board was the service of the temporary restraining order at 4:00 p.m. on June 23, 1950 (R. 335, 336, 281, 282).

For two years, i.e., since June 1948, there had been pending before the Board a complaint against Transamerica, a holding company which owns stock in companies engaged in diverse businesses, including various banks. The alleged purpose of the complaint was to require Transamerica to show cause why it should not divest itself "of any or all" of the stock it held in certain banks including, among others, the selling banks and Bank of America, on the theory that such stock might be found to be held in violation of Section 7 of the Clayton Act (R. 3, 4, 24, 25). Hearings have been held but the taking of testimony has not been concluded (R. 4). No findings or orders have been made (R. 6, 7, 70).

Bank of America is not a party to the proceedings before the Board (R. 3-4, 7-9, 24-25, 142).

After delaying until the purchase by Bank of America was complete, the Board on Friday afternoon, June 23, 1950, obtained without notice an *ex parte* temporary restraining order from three judges of the Court of Appeals for the Ninth Circuit. The next day, Saturday, June 24, 1950, the court convened, heard argument on a motion to dissolve the restraining order, and at 7:00 o'clock Saturday evening it issued an injunction order (R. 284). The injunction restrained Bank of America from "consummating or effectuating any arrangements or undertaking which would result in Bank of America acquiring any or all of the assets or banking business" of the selling banks until a final order was entered in the administrative proceedings against Transamerica (R. 70).

When the restraining order was served it was impossible to reconstitute the banks and reopen them under their former ownership by Monday morning (R. 336, 342, 343, 350, 351). The court at the Saturday hearing indicated it did not intend to require that anything be undone (R. 530). Bank of America interpreted the order to per-

mit it to open its newly authorized branches. It felt and was advised by counsel that no other interpretation was conceivable in view of the facts, the language of the court's order, and the public injury and apprehension which might follow failure to open the banks (R. 350, 351, 282-290). Other steps incidental to the acquisition which remained to be done, such as recording of deeds and the payment of the purchase price were suspended (R. 287, 132-135).

On Tuesday, June 27, 1950, the court cited petitioners as well as Transamerica and its president Mr. Husbands in civil and criminal contempt (R. 90, 91). On July 13, 1950 it issued its civil contempt order which required Bank of America to surrender the possession of the assets which it had purchased and required Transamerica to reconstitute the 22 banks as separate units (R. 173-177). This has been done (R. 646, 647).

The "Evidence" on which the Court Acted.

The entire factual showing of the Federal Reserve Board in connection with the proceedings for restraining order and injunction consisted of its written petition, verified on information and belief by counsel for the Board (R. 3-7), attached to this petition as Appendix B. A mere reading of the brief petition indicates not even a pretense of making a prima facie showing of the need for or right to an injunction. The only statements of fact contained in that application are the following:

(1) That the Board has charged Transamerica with violation of the Clayton Act in acquiring stock of certain specified banks including Bank of America, and has notified Transamerica to show cause why it should not be ordered to cease the alleged violations and divest itself of some or all of the specified bank stocks.

(2) That hearings are not completed.

(3) That the Bank of America unless restrained will on or before Monday, June 26, 1950, acquire the assets and deposit liabilities and thereby take over the banking businesses of 22 banks which are listed in the petition.

(4) That the acquisition of the assets and businesses of these banks will deprive the Board and the court of their respective jurisdictions "upon appropriate findings" to order Transamerica to divest itself of some or all of its stock in such banks in such a manner as to restore "actual and effective competition."

(5) That the Board is without statutory authority to protect its jurisdiction by its own order.

To this petition for injunction the Board attached the complaint and amended complaint against Transamerica pending before the Board, neither of which was verified. On this showing alone, the temporary restraining order was issued *ex parte*.

On the following day, Saturday, June 24, Bank of America moved to dissolve the restraints (R. 27-29). This motion was denied and on the same day the court issued an injunction in the same terms as the restraining order without any additional showing by the Board (R. 68-71). Subsequently on July 3, Bank of America filed its answer to the contempt petition and moved to dismiss the petition for injunction (R. 147). Among other grounds it specified the total absence of proof of any kind that any violation of law had occurred or that Bank of America had been a party to any of the alleged violations charged in the complaint against Transamerica but not yet proved at the hearings (R. 139-140, 142-144). It went further and by uncontradicted affidavits established that the proceedings before the Board would not be affected by the consummation of the transactions. It sought to take depositions and to produce witnesses who could be cross-examined by the Board (R. 92-96). This was denied (R. 102, 103).

Among the affidavits presented was one from the Comptroller of the Currency stating that he had made extensive examination of the competitive situation created by the acquisition of the 22 banks involved and their operation as branches of the Bank of America; that his records indicated that the Federal Reserve Board was kept generally informed of the status of the applications of Bank of America to establish branches and that the Board had been "notified at least as early as the middle of April, 1950, of the [Comptroller's] intention to grant the branch permits . . " (R. 254, 255). A copy of the Comptroller's affidavit is hereto attached as Appendix C.

Other affidavits filed by the Bank of America and Transamerica showed in considerable detail that the injunction order was not either necessary or appropriate in aid of the administrative proceeding. They established, among other things,

(1) that the Board's counsel had admitted on the record in the administrative proceeding that there was no showing of abuse or monopoly by Transamerica Corporation, but had built his case on a theory of tendency of monopoly in the future (R. 291-292);

(2) that in the administrative proceeding, the Board's counsel had limited his proof to evidence designed to justify preventing Transamerica from acquiring stock in additional banks and that he had adduced no proof designed to establish the necessity for divesting Transamerica of any of its existing bank stockholdings, including its stock in the 22 banks and its 11% investment in petitioner bank (R. 292-293);

(3) that Transamerica did not have any power to control Bank of America in any way and was merely one stockholder owning 11% stock interest in petitioner bank (R. 339, 305, 308, *cf.* 291);

(4) that no substantial lessening of competition would result from the sale of the assets of the 22 banks (R. 340, 254, 255); and

(5) that irreparable injury would be done to petitioner bank, to the selling banks, to Transamerica and to investors and depositors if the injunction was permitted to remain outstanding (R. 32, 33, 37-38, 256-275).

No contrary evidence on any of these points was submitted by the Board. The only showing on the part of the Board was the petition itself, verified on information and belief by the Board's counsel. (Appendix B to this petition.) (There were some other affidavits presented by the Board in connection with the contempt proceeding (R. 177-253), but they dealt only with the issue of compliance with the court's order and the court specifically stated it did not rely on those affidavits (R. 165-166).)

Conclusions of the Court.

The court relied entirely, in support of its orders, on the fact that an uncompleted proceeding was pending before the Board in which the Board might at some future time attempt to enter an order, the operation of which might be obstructed by the transaction in issue. There were no findings that the sale of the assets of the 22 banks to Bank of America was in any way illegal. There were no findings that Transamerica controlled Bank of America. Indeed, as the court conceded, there was no evidence before it which could conceivably support such findings (R. 81). The sole finding upon which the court's orders depended was that the administrative proceedings were in process.

In response to the contentions of the Bank that an injunction could not be issued because the transactions had been completed, the Court found that the Bank had not actually taken possession of the assets at the time the restraining order was issued (R. 73, 74).

With respect to the clear interference with the jurisdiction of the Comptroller of the Currency involved in the injunctive orders, the Court, in its opinion of June 27, disclosed that it was proceeding on a plainly erroneous understanding of the facts. The Court said:

> "The facts do show an unfortunate working at cross purposes of two government agencies. What we say is not to be taken as a criticism of the Comptroller for thus apparently lending aid to an attempted evasion of the order of the Board of Governors. Apparently the Comptroller felt obliged to issue these certificates in return for an agreement of the respondent bank to increase its capitalization to a figure which he thought necessary in the public interest. Doubtless the Comptroller deplored a state of the law which reduced him to this expedient. But in making his decision he neither considered, nor was charged with determining, any of the issues committed to the Board of Governors." (R. 80).

The Comptroller's affidavit, filed on July 5, showed that this statement of the Court was clearly unwarranted. There was absolutely no basis for the court's assertion that the Comptroller "felt obliged" to issue the permits in return for an agreement of the Bank to increase its capitalization. Rather it appears that the Comptroller thought the increase in capital was a desirable prerequisite to the authorization of additional branches which he had approved in the public interest, after investigation (R. 254, 255).

The Comptroller's affidavit showed the most careful consideration by him of the public interest, including not only the capitalization of the bank but the situation which each branch created with respect to competition with existing banking facilities. He plainly stated that he gave consideration to "the rights of existing banking facilities to remain undisturbed and free from additional competition . . . " and carefully weighed this against the rights of the prospective branch "to be permitted to enter the area as a competing unit" (R. 255).

Despite this uncontradicted affidavit of the Comptroller of the Currency, the court did not in its subsequent opinion of July 10, revise or correct its finding with respect to these vital issues.

The court was equally misinformed in its finding, in its opinion of June 27, that the Board had acted with due diligence in filing its petition for a restraining order and injunction. The court chose to believe that the Board first received notice of the Comptroller's intention to issue the permits on June 14, only nine days before it filed its petition for a restraining order (R. 80). As the affidavit of the Comptroller filed on July 5 shows, the Board received such notice at least as early as the middle of April—over two months before its petition was filed (R. 255). In its subsequent opinion of July 10, the court admitted its error in this respect but stated merely that the Board's delay in acting went "only to a balancing of conveniences . . . " (R. 165).

Again, in its first opinion of June 27, the Court found that Bank of America and Transamerica proceeded with "unseemly haste" to consummate the acquisition (R. 81). The court completely disregarded the uncontradicted evidence that the acquisition had been in process and a matter of public knowledge for many months (R. 37, 38, *cf.* 257-268).

The court conceded that there was no showing that any order against Transamerica or affecting Bank of America could reasonably be anticipated in the proceedings before the Board. The mere possibility that such an order might ultimately be issued was held to be sufficient basis for the relief granted. The court said:

> "The facts with which the Board is dealing are not before us. Nor do we assume that the Board will ultimately find that the stock acquisitions of which complaint has been made are such as will substantially lessen competition, or tend to monopoly. But we cannot assume that such results could not appear."

On this basis the court annulled valuable contracts to purchase bank assets, and in effect set aside the ruling of the Comptroller of the Currency.

Opinions of the Court Below.

The court below wrote two opinions, one on June 27 with respect to the granting of the injunction order of June 24 (R. 72-82) and the other on July 10 with respect to contempt and the motion to dissolve the injunction (R. 155-166).

In its first opinion, it based its jurisdiction on the all writs section (28 U. S. C., Sec. 1651). It held that since a final order of the Board against Transamerica might be enforced or reviewed in the Ninth Circuit (or in the Third Circuit), its enforcing jurisdiction gave it the right even prior to a final order to enjoin transactions which might conceivably affect the jurisdiction of the Board and the resulting enforcing jurisdiction of the court after final order (R. 75-77). It held that the Board "in case it finds the same warranted" might compel Transamerica to divest its stock in the selling banks in such a way that the assets and banking businesses should not come into the possession of the Bank of America, citing *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554. It further was of the opinion that, under applicable decisions of this court (*Arrow-Hart & Hegeman Electric Co.* v. *F. T. C.*, 291 U. S. 587) any such power of the Board would be lost if the sale of assets here involved should be consummated before the Board issued a final order (R. 77).

In its second opinion on July 10, 1950, the court dismissed the criminal contempt but found petitioners as well as Transamerica and its president guilty of civil contempt (R. 166). The court reaffirmed its claim to jurisdiction, relying on *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (C. A. 2, 1948) (R. 165).

Specifications of Error.

Petitioners adopt all the specifications of error set out in the petition of Transamerica for certiorari filed in this case. Petitioners desire, however, to emphasize certain

errors of particular consequence from their own point of view.

1. The court erred in assuming under the all writs section powers of a court of general equity jurisdiction to issue an injunction on original petition in alleged aid of an order which the Board has not yet made in a proceeding to which these petitioners were not parties.

2. The court erred in setting aside petitioner bank's binding contracts in the absence of any factual justification.

3. The court erred in holding that petitioner bank could be enjoined from acquiring assets and operating branches at locations for which the Comptroller of the Currency had granted permits to petitioner bank.

4. The court erred in holding that the public interest and balance of convenience required the invasion of property and contract rights particularly after the administrative tribunal had knowingly permitted transactions which it sought to enjoin to ripen into binding contracts, performance under which was substantially complete.

5. The court erred in holding that it had power, in aid of an administrative agency's asserted jurisdiction to enter a future order, to prohibit petitioners who are not parties to the agency's proceedings from exercising valuable rights under a binding contract.

Reasons for Granting the Writ.

I. The decision below is a revolutionary departure from the well-established principle that a temporary injunction will not be issued in the absence of a factual showing that the party seeking the injunction has at least a prima facie case of violation of law and irreparable injury. Here the court deprived Bank of America of assets it had purchased for approximately $19,000,000 without any showing other than the fact that an administrative proceeding was pend-

ing against the majority stockholder of the sellers, seeking entirely different relief.

If this be the law, any court may grant an injunction to an administrative agency upon a mere showing that the agency has a proceeding pending before itself. On the representation of any prosecuting officer of an administrative agency that a complaint has been brought before that agency, all that the court need do is to examine the complaint. Under this decision it may then enjoin any and all transactions either by parties to the administrative proceeding or outsiders if the unsupported allegations of the complaint are broad enough to permit the possibility of some ultimate relief against some of the parties.

The Attorney General has concurrent power to enforce the Clayton Act (15 U. S. C. §15). Had he filed suit in a District Court making the same allegations as the Federal Reserve Board did in its administrative complaint and its petition to the Court of Appeals, it is plain that he could not have obtained an injunction without (1) an affirmative showing sufficient to establish a prima facie case against the defendants, and (2) a showing that a final order to which the government was prima facie entitled would be frustrated if an injunction were not issued. *DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212, 219, citing *Appalachian Coals Inc.* v. *United States*, 288 U. S. 344, 377, where this court said: "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be 'a definite factual showing of illegality,' *Standard Oil Co.* v. *U. S.*, 283 U. S. page 179." See also in the lower courts: *United States* v. *Schine Chain Theatres*, 31 F. Supp. 270 (W. D. N. Y., 1940); *Lowe* v. *Consolidated Edison Company*, 67 F. Supp. 287 (S. D. N. Y., 1941); *U. S.* v. *Bausch & Lomb Optical Co.*, 3 F. R. D. 331 (S. D. N. Y., 1943). Cf. *United States* v. *Columbia Steel Co.*, 71 F. Supp. 734 (D. Del., 1947).

In granting the injunction, the court below appeared to believe that it had the general equity powers of a district court. It apparently felt, however, that it was free to act without the factual showing required when a District Court exercises the drastic power of injunction. Thus, the court relied upon *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (CCA 2d, 1948) which involved an injunctive order issued by a district court, ancillary to a Maritime Commission proceeding, but ignored the fact that the showing of a probable violation of law and of irreparable injury in the *Seatrain* case was so clear that the findings of the court to that effect could not seriously be contested.

Here the court does not even assert a probability that a violation of law will be proved against either Bank of America or Transamerica. The court insists that the mere possibility of such proof being produced in the future in a proceeding to which Bank of America is not even a party is all that is necessary to deprive the bank of its property, as appears in the following language:

> "The facts with which the Board is dealing are not before us. Nor do we assume that the Board will ultimately find that the stock acquisitions of which complaint has been made are such as will substantially lessen competition, or tend to monopoly. But we cannot assume that such results could not appear." (R. 81)

To this the court might well have added that the "facts" were not yet even before the Board, for none have yet been found or reported to it.

Compare the quoted language with a conventional statement of the established rule:

> "Injunctions go only in cases of urgent necessity, made to appear by competent, material, credible, and preponderating evidence, to guard against injuries, not merely feared by the applicant, but reasonably to be apprehended, and likely to be irreparable."

Great Northern Ry. Co. v. *Local G. F. L. of I. A. of M.*, 283 Fed. 557, 563 (D. Mont., 1922).[1] See also this Court's rulings in *Appalachian Coals Inc.* v. *United States* and *Standard Oil Co.* v. *United States, supra.*

In the case of *Hecht Co.* v. *Bowles*, 321 U. S. 321, this Court refused to permit an injunction even where specifically authorized by the Price Control Act, since there was no showing of necessity in accordance with established principles of equity.

Unless reversed by this Court, the decision below makes it possible for administrative agencies to freeze business transactions during the pendency of administrative proceedings without any showing whatsoever. It authorizes the courts without regard to established principles of equitable jurisdiction to act as mere messengers for the administrative branch of the government. It further deprives the citizen of the protection of his property rights under es-

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[1] In *Guaranty Trust Co. of New York* v. *Henwood*, 86 F. 2d 347, 354 (CCA 8th, 1936), the Court, in remanding the cause to the lower court to dissolve an injunction improvidently granted, stated:

> "General allegations in a complaint or in affidavits stating the judgment, opinion, or conclusion of the pleader are insufficient as a basis for an injunction. Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 34 S. Ct. 48, 58 L. Ed. 229. Appellee had the burden of proof to show the necessity for an injunction, and this could only be sustained by competent, material, and credible evidence. Facts, not conclusions or opinions, must be stated upon which the court may base its judgment, according to established principles governing equitable relief by injunction."

See also *Madison Square Garden Corporation* v. *Braddock*, 90 F. 2d 924 (CCA 3rd, 1937); *Walling* v. *Associated Truck Lines*, 57 F. Supp. 943 (D. C., W. D. Mich., S. D., 1944); *U. S.* v. *Rogles*, 9 F. Supp. 857 (D. C. E. D. Mo., E. D., 1935); *Henderson Co.* v. *Thompson*, 12 F. Supp. 519 (D. C., W. D. Texas, Austin Div., 1935); *Barker Painting Co.* v. *Brotherhood of Painters, Decorators and Paperhangers of America, et al.*, 15 F. 2d 16 (CCA 3rd, 1926), cert. den. 273 U. S. 748; *Bowles* v. *Minish, et al.*, 56 F. Supp. 153 (D. C. S. D. Ala., S. D., 1944) *Anargyros & Co.* v. *Anargyros*, 167 Fed. 753 (CCA 9th, 1909); *Hall Signal Co., et al.* v. *General Ry. Signal Co., et al.*, 153 Fed. 907 (CCA 2nd, 1907).

tablished rules of equity which require a showing of probable cause as a condition to equitable relief.

The right to similar relief was denied by this Court in the *DeBeers* case, *supra*, where at pages 222 and 223 of 325 U. S. this Court said:

> "To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, *on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree.* . . . No relief of this character has been thought justified in the long history of equity jurisprudence." (Emphasis supplied)

We submit that the decision below is an unprecedented taking of private property without fair hearing or factual showing of any kind, and is in conflict with the decisions of this Court. It should not be permitted to stand as the controlling authority for the Ninth Circuit, or as a precedent in other circuits.

II. This case presents an attempt by a United States Court of Appeals to assume the original equity powers of a court of general jurisdiction, in contravention of the established rule that Courts of Appeals are courts of limited jurisdiction. The court below has issued a writ of injunction on the original petition of the Board relying for its presumed authority on the all writs section of the Judical Code (28 U.S.C. § 1651). Its theory was that since it might have jurisdiction to enforce a final order of the Board, it could enter an injunction upon petition of the Board presumably in aid of an order that the Board might attempt to issue at some later date when its proceedings are concluded.

The court below erroneously assumed that it (i.e., a Court of Appeals) was "the only court vested with enforcement of this Act" (R. 76) and that if it did not assume jurisdiction "no court could do anything" (R. 78). The only case in point, however, to which it referred was *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc., supra,* which was a proceeding in a District Court and not a Court of Appeals.

This is the first time that a United States Court of Appeals has issued a writ of injunction on original petition of an administrative agency prior to the final order of the agency. We believe that in so doing the court has ignored the decisions of this Court and has attempted to assert original equity jurisdiction, which is conferred by statute only on the District Courts. This Court has established that Courts of Appeals are courts of limited jurisdiction. In *AFL* v. *NLRB,* 308 U. S. 401, 404, this Court stated:

> "The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts by § 24 of the Judicial Code, as amended. 28 U. S. C. § 41, 28 U. S. C. A. § 41. Such jurisdiction as it has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review. Here, the provisions of the Wagner Act, § 10(f), which gives a right of review to 'any person aggrieved by a final order of the Board', determines the nature and scope of the review by the court of appeals."

The procedure for review or enforcement of a Board order under Section 11 of the Clayton Act is almost identical with that of the review of orders of the Labor Board and of various other administrative agencies. Section 11 gives the Courts of Appeals specific delegated jurisdiction

on petition to enforce or review the final orders of an administrative agency. The section grants them no other or further authority. It gives no jurisdiction to entertain original petitions before final order of the Board. Thus, Courts of Appeals have no power to enter any orders in respect of administrative proceedings except after petition has been filed to review or enforce a final order. Until that time they have no "jurisdiction" to aid or protect under the all writs section.

That Courts of Appeals may not use the all writs section to entertain jurisdiction prior to final order was decided by this Court in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375. And even after jurisdiction of the Court of Appeals has attached by the filing of a petition to review, that jurisdiction is severely limited. In *Ex parte NLRB*, 304 U. S. 486, it was held that the Court of Appeals could not enjoin action which would defeat its jurisdiction, i.e, vacation of the order of the Labor Board.

The decision below is in conflict with these decisions and should be reviewed by this Court.

The court below held that it had power to issue these orders under the all writs section prior to the filing of a petition to review or enforce. In doing so, it relied on cases involving the appellate jurisdiction of courts of appeals over district courts and holding that writs may issue to district courts before an appeal is filed. (R. 75, 76) The court held that this principle applied also in aid of its "original jurisdiction", on petition to review administrative findings. (R. 76). This is, of course, a *non sequitur*. As this Court said in *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144:

> ". . . to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation

and at the same time to disregard the traditional scope, however far-reaching, of the judicial process."[2]

Courts of Appeals having no general equity powers are not equipped, as are District Courts, with the procedural mechanism to issue peremptory and interlocutory orders while protecting the rights of the parties before them. They do not have rules of trial procedure. They are not accustomed or equipped to try issues of fact. They are also faced with other problems which District Courts do not face. In the present case, for example, the Court of Appeals was concerned with the fact that review and enforcement might be had in the Third Circuit as well as the Ninth Circuit. Accordingly, it was not certain whether the injunction was in aid of its own jurisdiction or the jurisdiction of the Third Circuit. Of course, under the all writs section, the court's right to issue writs is only in aid of its own jurisdiction (28 U. S. C. § 1651). The court below resolved this conflict in favor of its own power only because it seemed that not to act was "to say that under the circumstances no court could do anything". (R. 78) This reasoning ignored the fact that District Courts were available with general equity jurisdiction to grant any extraordinary interim relief which might be necessary and appropriate. See *e.g.* 28 U. S. C. § 1337. Such a remedy was afforded by a District Court in *West India Fruit &*

[2] The Court there also commented (at page 141):

"A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution."

Steamship Co. v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (CA 2nd, 1948), *supra*. Curiously enough it was that case which the court below used to justify its own assumption of equity jurisdiction.

On the jurisdiction of District Courts to prevent irreparable injury prior to final order in an administrative proceeding, see also *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56 and *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177. Cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498.

The court below purported to act in aid of a jurisdiction which it did not have and which it may never acquire. In doing so, it created in the Courts of Appeals a forum to which administrative agencies may be expected to resort frequently. If such jurisdiction of the Courts of Appeals is sustained, it should be equally available to parties before the administrative agencies. Opening the door to such litigation would place the Supreme Court in the position of the only reviewing court. This would impose a greater burden on this Court in the exercise of its jurisdiction on certiorari, for where the original decision is by a Court of Appeals and no other appellate review has been had, the considerations for granting review are especially pressing. The procedure of compelling resort to District Courts and limiting Courts of Appeals to their statutory jurisdiction is a well considered one and should not be altered. To allow the decision of the court below to stand would have important consequences adverse to the proper relation of the courts to administrative agencies.

III. The decision of the court below is in conflict with the decision of this Court in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587.

(a) The *Arrow-Hart* case holds that an acquisition of assets during the pendency of administrative proceedings under Section 7 of the Clayton Act may not be ordered

reversed by the Federal Trade Commission. It plainly states that such acquisitions are beyond the purview of the Clayton Act and within the jurisdiction only of the courts under the Sherman Act. The court below has held that the mere pendency of administrative proceedings under Section 7 authorizes and requires the issuance of an injunction without any showing of probable violation of law. Accordingly, under this decision, all that is necessary to avoid the *Arrow-Hart* case is for the administrative agency to seek interim relief from a court of appeals. An injunction will automatically be granted upon the showing merely of the pendency of the administrative proceeding. The result will be to construe the Clayton Act to give the Federal Trade Commission control over the sale of assets,—a result this Court in the *Arrow-Hart* case has held Congress did not intend, and which the Congress has refused to grant to the Federal Trade Commission despite repeated requests.[3] This Court should insist that the requests of administrative agencies for power to control sales of assets should be addressed in the future as they have in the past, to the Congress and not to the courts.

(b) Plainly the *Arrow-Hart* case means that the pendency of administrative proceedings under the Clayton Act is not a bar to sales of assets. Yet in the present case such a sale has been enjoined.

There is no difference in principle between the substantially performed contracts of sale executed before the court's order here and the complete acquisition of the assets in the *Arrow-Hart* case. Here formal contracts were entered into and the selling banks had taken all action necessary to complete the transfer, before the restraining order was issued. The contracts here involved are sales of assets within the *Arrow-Hart* case.

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[3] See e. g. F. T. C. Annual Reports 1939, pp. 14-16, 1940, pp. 12, 13, 1941, pp. 19, 20; T. N. E. C. Final Report, S. Doc. 35, 77th Cong. 1st Sess. pp. 38-40; H. R. 2734, 81st Cong., 1st Sess., and H. Rept. No. 1191 thereon.

(c) Even if the Board should make a final order requiring divestment by Transamerica of the stock of the 22 banks, it could not require those banks to refuse to perform binding contracts for the sale of their assets entered into before any final order of the Board. As this Court said in *Thatcher Manufacturing Company* v. *F. T. C.*, 272 U. S. 554, 561: " . . . When the Commission institutes a proceeding based upon the holding of stock contrary to section 7 of the Clayton Act, its power is limited by section 11 to an order requiring the guilty person to cease and desist from such violation, effectually to divest itself of the stock, and to make no further use of it." For sales of assets contended to be unlawful ". . . a remedy is provided through the courts. [Citing the Sherman Act and Sections 4, 15 and 16 of the Clayton Act] . . ."

Under *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, a final order of the Board could, in an appropriate situation, restrict the sale of "assets underlying the stock" (R. 77) as incidental to an order for divestment of stock. This does not mean, however, that such an order could reach assets already sold or subject to a contract of sale. For in such a case the stock no longer represents control of such assets and those assets are no longer "assets underlying the stock".

Accordingly, the Board may not legally make a final order in the Clayton Act proceedings which prohibits the consummation of the contracts for the sale of the assets of the 22 banks. Therefore, it has no right to seek a pendente lite order to the same effect. Where "a proposed transfer cannot be stopped" by the Board, "it should not be permitted to delay what it cannot prevent." *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 515.

IV. This case presents an important question of the allocation of jurisdiction over the national banking system between the Federal Reserve Board and the Comptroller of the Currency.

The Comptroller of the Currency, administering the law (12 U. S. C. § 36) and applying published standards (12 C. F. R. § 4.5), authorized the opening of branches of petitioner Bank of America at twenty-seven locations occupied by the 22 selling banks. In so doing, he considered the public interest, including such questions of consequence to the operation of a sound banking system as the quality of the bank's management, the sufficiency of its resources, the ability of the new branch to serve and protect existing business, the competitive effect in relation to existing banking facilities, and the adequacy of business in the light of the population and economic character of the area. (See his affidavit, R. 254, 255). This action was taken pursuant to an historic jurisdiction conceded to be exclusive. See *Casey* v. *Galli*, 94 U. S. 673; *Schechter* v. *Sherwin*, 81 F. 2d 603 (CCA 7, 1936); *Benedict* v. *Anderson*, 70 F. 2d 227 (CCA 6th, 1934); *Liberty National Bank* v. *McIntosh*, 16 F. 2d 906 (CCA 4, 1927).

Having reached this determination, the Comptroller then made a firm commitment to the Bank of America that he would grant permits to operate new branches in connection with the acquisition of the assets and banking businesses of the twenty-two banks on condition that the bank raise additional capital. Such a commitment was necessary as a business matter since the Bank would otherwise have no basis for asking investors to supply additional capital. (R. 334). In reliance upon this commitment, 125,000 investors have paid in over $71,000,000. (R. 37)

The court below has directed a repudiation of the Comptroller's commitment at the insistence of the Federal Reserve Board, which has no official responsibility in the matter.

These petitioners believe that they and the investing public had a right to rely on the Comptroller's commitment. It is essential to the efficient operation of the banking system that the official who has exclusive general supervisory jurisdiction shall be authorized to make and keep commit-

ments incidental to the performance of his functions, without let or hindrance by any other government agency.

The court below did not even accord a presumption of regularity to the decision of the Comptroller that the opening of these branches incidental to the taking over of the assets of the twenty-two banks would be in the public interest. Plainly, the Comptroller's action should not be set aside, as it was by the court below, on the mere assertion of the Federal Reserve Board that it has pending before it proceedings in which it *may* reach a result inconsistent with the Comptroller's decision. Certainly the Comptroller's decision and his solemn commitment, like other official action, should not be abrogated unless he is a party to the proceeding and except on an affirmative showing of violation of law, or other invalidating cause.

Whether the Comptroller shall have authority to carry out solemn obligations made in good faith and relied on by the public, or whether supervisory power to nullify such commitments rests in the Federal Reserve Board and the courts upon the Board's petition in a case in which the Comptroller is not a party presents an important question which should be decided by this Court.

CONCLUSION.

For the reasons stated, and for the further reasons stated in the petition of Transamerica Corporation, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1950

APPENDIX A.

Section 7 of the Clayton Act (15 U. S. C., Sec. 18) in pertinent part reads as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

Section 11 of the Clayton Act (15 U. S. C., Sec. 2) reads as follows:

> "Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers sub-

ject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Authority where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any

time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

"Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same."

12 U. S. C., Sec. 1 states:

"There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal Reserve notes, the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general directions of the Secretary of the Treasury."

12 U. S. C., Sec. 36 in pertinent part reads as follows:

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks . . .

"(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

"(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

* * *

"(h) The words 'State bank,' 'State banks', 'bank', or 'banks', as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

APPENDIX B. (R. 3 to 7)

Petition for Temporary Restraining Order, Permanent Injunction, and Other Relief.

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The Board of Governors of the Federal Reserve System (hereinafter called the Board) respectfully petitions this Court for relief appropriate to prevent the frustration of the Board's jurisdiction and that of this Court which will result if certain action, hereinafter described, now imminently threatened to be taken by respondents is consummated and effectuated. Jurisdiction to grant the relief sought is vested in this Court by Title 28 U. S. C., Section 1651 (formerly 28 U. S. C. 377).

In support of its petition, the Board, on information and belief, respectfully shows as follows:

(1) The Board is an independent agency of the United States Government created by Act of Congress of December 13, 1913 (38 Stat. 251, Ch. 6; 12 U. S. C. 221).

(2) Respondent Transamerica Corporation (hereinafter referred to as Transamerica) is a corporation organized under the laws of the State of Delaware, having its principal office in the City of San Francisco, State of California. Respondent Bank of America National Trust and Savings Association (hereinafter referred to as Bank of America) is a national banking association organized under the National Bank Act (12 U. S. C. 21), having its principal office in the City of San Francisco, State of California, and operating in excess of 500 branches located throughout the State of California.

(3) On June 24, 1948, the Board, acting pursuant to the provisions of Section 11 of the Clayton Act (15 U. S. C. 21) issued its Complaint against Transamerica, charging *inter alia* that the acquisition by that corporation of the capital stocks of various banks named in Paragraph 4 of the Com-